

## Government Actions Lead to Increased Litigation Activity

Written by Nick Sanders

Wednesday, 21 November 2012 00:00

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Look, we could link to article after article on this site, predicting an increase in litigation activity stemming from government initiatives, actions, inactions, and general incompetency. Trust us; we have the support at hand. But we're not going to do it.

Instead, allow us a brief moment to say "*Told you so.*"

The chickens are coming home to roost for the U.S. Government and its multitude of trial attorneys, agency attorneys, and legal advisers. Quite honestly, the litigation tsunami is manifesting a bit earlier than we thought. But with just as much candor, let us also predict that this is but the tip of the iceberg.

Readers, *you ain't seen nothin' yet.*

The Armed Services Board of Contract Appeals (ASBCA) [recently reported](#) an increase in its docket of 114 appeals—which is an increase of about 20 percent over last year's docket. Our understanding is that the increased workload for government attorneys is leading to an increase in motions for extensions—though of course that's anecdotal and unsupported by statistical evidence.

Over at the GAO, the FY 2012 bid protest statistics were [just released](#). The very respected government contract attorneys at the firm of McKenna, Long & Aldridge [described](#)

the statistics and noted that the number of protests filed was up by five percent and the sustention rate increased from 16 percent to 18.6 percent. (Note that 2.6 point increase is a relative increase of more than 16 percent.) Interestingly, the McKenna Long attorneys wrote—

... the number of decisions on the merits, 570, is almost double the number of decisions issued in 2008, a remarkable jump in only four years. Moreover, the Report shows a decrease in the amount of protests that utilize the GAO's alternative dispute resolution ('ADR') procedures. For fiscal year 2012, the number of ADR cases is down by about 25 percent from fiscal year 2011, and down by 33 percent from fiscal year 2010.

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So what's happening at the GAO is consistent with our prediction: bid protests are up, the sustention rate is up, and the use of ADR has dropped significantly. This situation is, in our view, not good. Bid protests occur (generally) because one party thinks it's been treated inequitably. Protests are sustained when the GAO attorneys agree with that party. ADR is used when the government wants to settle the matter quickly, without a lot of formalities. The statistics seem to say that acquisition competency is down but the agencies don't want to admit to their employees' lack of acumen.

We can't find similar stats for the Court of Federal Claims, but we're willing to stick with our prediction that the tide of litigation is rising there, as well.

And you ain't seen nothing yet.